No. 2478

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE TRINITY GOLD DREDGING AND HYDRAULIC COMPANY (a corporation),

Appellant,

vs.

ANGELE BEAUDRY, as executrix of the last will and testament of Frederic Beaudry, deceased, and Angele Beaudry, individually,

Appellees.

BRIEF FOR APPELLANT.

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Statement of the Case.

Appellant was complainant in the court below in an action for relief upon rescission of a contract of sale of certain mining properties. The District Court granted a motion to dismiss which appellees interposed to appellant's amended bill of complaint, and from the judgment entered upon the order granting such motion this appeal is taken.

Appellant's amended bill of complaint sets up a cause of action for the rescission of a contract of sale,

wherein appellant's assignor agreed to purchase from one Frederic Beaudry, appellee's testator, twenty-one mining claims situated in Trinity County, California. The total purchase price was $250,000, payable in specified instalments. Under certain extensions which were agreed to by the parties, and which are set out in the amended bill, the date of the last payment was fixed at December 31, 1912. On that date, when all save $50,000 had been paid on the purchase price, appellant refused to make the final payment and demanded a rescission of the contract, basing its right to rescind upon the fact that its vendor's title to seven out of the twenty-one claims was "incurably defective by any ordinary method of business negotiation."

Appellee's motion to dismiss was based primarily upon two grounds: (a) upon the contention that the contract between appellant and Frederic Beaudry called only for a quitclaim deed of the latter's interest in the claims, and not for a valid title to the claims; (b) upon the contention that if, under the contract, the appellant had the right to rescind, such right of rescission was lost to appellant by *laches*.

There were a few minor grounds set out in the motion to dismiss, but the ones which we have noticed present the vital issues in the case.

The amended bill contains a more detailed statement of the facts above outlined. In the course of our argument we shall uniformly refer to appellant as complainant and to appellees as the defendants.

Specifications of Errors.

There are nine assignments of error (tr. fols. 113-116). They attack the action of the District Court in granting the motion to dismiss the amended bill and in entering judgment for the appellees, and particularly assail the conclusions of the learned district judge in holding that the contract between Frederic Beaudry and the appellant did not call for a valid title to the mining claims, and that appellant was barred by *laches*.

Brief of the Argument.

I.

The Contract Called for a Valid Title to the Mining Claims, Not a Mere Quitclaim of Beaudry's Interest. It Did Not Call for Patents, but it Did Call for Validly Located Mining Claims, as Distinguished From Mere Prospects.

(1) THE TERMS OF THE CONTRACT CONSIDERED.

The contract involved was dated July 21, 1906, and is set forth as Exhibit "A" to the claim annexed to the amended bill as Exhibit "A" (tr. fols. 66-70). It was an agreement upon the part of Fred Beaudry, defendant's testator, to sell twenty-one mining claims. Eight of these claims are described as "patented"; eight as "unpatented"; and five as "receiver's receipts". Beaudry is described as

> "being the sole owner and in possession of"

the said claims (tr. fol. 66), and as such he agrees

> "to make a good and sufficient deed for all of said properties, free from all incumbrances" (tr. fol. 68).

In another part of the contract it is provided that upon breach of any condition by the vendee, Beaudry shall be released

> "from any obligation in law or equity *to convey* said properties" (tr. fol. 69).

In a subsequent modification of the agreement, complainant agreed to bear the expense of certain contests brought by the United States Government with respect to the unpatented claims (tr. fol. 82). This was the only modification which is alleged to affect the interpretation of the contract in this regard.

(2) IN THE ABSENCE OF EXPRESS PROVISION TO THE CONTRARY, A CONTRACT FOR THE SALE OF REALTY REQUIRES THE VENDOR TO CONVEY A GOOD TITLE.

We shall rest our main contention upon the propositions that the contract here involved cannot be construed as a contract for the vendor's interest only; first, because it contains express covenants and language calling for a valid title; secondly, because it contains nothing to stamp it as an agreement for a quitclaim.

We desire to show first, however, that in order to establish the character of this contract as a contract for a quitclaim deed, the burden was upon the defendants to remove the contract from the application of the general rule. An unqualified agreement to sell realty imposes upon the vendor the obligation to convey a good title. The mere agreement to sell carries an implied agreement "that the vendor's conveyance will transfer a good title".

Wilcox v. Lattin, infra.

It devolves upon defendants, therefore, to show that Beaudry's agreement was qualified, and that which is relied upon as such a qualification must be strong enough to overcome the covenant implied from the agreement to sell, and must not be outweighed or offset by other express provisions of the contract.

39 Cyc., 1442.

"In the absence of an express provision indicating the character of title provided for by a contract of sale of real property, the implication is that a good or marketable title in fee simple is intended in all executory contracts, and as a rule the purchaser is under no obligation to accept a defective title."

Wilcox v. Lattin, 93 Cal. 588, at p. 594.

"The vendor in any executory agreement for the sale of land impliedly represents that he has a good title thereto as one of the considerations for inducing the vendee to enter into the contract, and that the conveyance therein agreed to be made by him will transfer such title."

Easton v. Montgomery, 90 Cal. 307, at p. 314.

"In every executory contract for the sale of land, there is an implied condition that the title of the vendor is good, and that he will transfer to the vendee, by his deed of conveyance, a title unencumbered and without defect."

Penfield v. Clark, 62 Barb. 584.

"In every contract for the sale of land there is an implied warranty that the vendor has a good title; unless the warranty is *expressly excluded by the terms of the contract.* The provision for a covenant in the deed against the vendor's own

acts, is not an express exclusion of the implied covenant, and is not in any manner inconsistent with it."

Burwell v. Jackson, 9 N. Y. 535, at p. 539.

"The vendors agreed that on the performance by the purchaser of the covenant on his part, they would 'execute or cause to be made and executed unto the said party of the second part, or his legal representative or representatives, on the first day of June, 1836, a good and sufficient deed of conveyance of a certain lot of land', etc. Is the covenant satisfied by the execution of a deed good in point of form merely?, or does it require such a deed as will convey a good title to the land sold? If those obvious principles of natural justice, which the law applies to analogous cases, are to be applied to this, it would seem that the question here presented ought not to admit of serious doubt. Upon every sale of a chattel, the law implies a warranty on the part of the vendor that he is the owner of the property and has a right to convey, although nothing whatever is said on the subject. This is not an arbitrary or accidental rule, but one which rests upon a solid foundation of reason and justice. It is fair and just to presume that a vendor knows the nature and extent of his own rights. The vendee has not the same means of knowledge. To require a vendor, therefore, to make good the title to that which he assumes to sell, is simply requiring him to guarantee that he is not committing a fraud."

* * * * * *

"I have no hesitation, therefore, in holding that, under a covenant, like that in this case, to execute 'a good and sufficient deed of conveyance' of lands, a vendor has a right, if he discover the title to be defective, to refuse to receive it, and this right is not affected by the fact that the defect might

> have been discovered, at the time of entering into the agreement to purchase, by an examination of the public records.''

(3) THE CONTRACT CONTAINS PROVISIONS UNIFORMLY HELD TO CALL FOR TITLE.

Certain definite phrases or expressions have been construed repeatedly by the courts as stamping the contract containing them as an agreement to convey a good title, as distinguished from an agreement for a quitclaim of the vendor's interest. Whenever these expressions are found in a contract for the sale of realty, the vendor is foreclosed from asserting that the contract is simply for a quitclaim.

Thus, in

39 Cyc., 1445,

it is said:

> ''Particular provisions are frequently found in contracts which specifically or by implication require the vendor's title to be good. Thus it has been held that the conveyance of a good title by the vendor is required where a contract for the sale of land provides for a * * * deed or conveyance 'clear of all incumbrances' * * * 'a good and sufficient conveyance', etc.''

(a) *The covenant ''to make a good and sufficient deed'' is a covenant to convey a valid title.*

It is now well settled that where a contract for the sale of realty contains a covenant that the vendor will ''make a good and sufficient conveyance'', the vendor is bound to convey a good title. The covenant

is now uniformly held to relate to the title to be conveyed by the deed; not to the form of the deed.

> *Turner v. Ogden*, 66 U. S. 450; 17 L. ed. 203.
>
> "Where the words of plaintiff's covenant are, 'that he will make a deed' to his vendees, the meaning of these words in the contract requires that the deed shall convey the land, and it is not sufficient to aver plaintiff's readiness to perform, merely according to the letter of the contract."
>
> *Haynes v. White*, 55 Cal. 38.
>
> "An agreement to sell land, and, upon the payment of the purchase money, to execute a good and sufficient deed therefor, requires of the vendor to convey to the vendee the *title* to the land, and is not satisfied by the tender of a deed sufficient in *form*, when the vendor has, in fact, no title to convey."
>
> *Gates v. McLean*, 70 Cal. 45.
>
> "The effect of the promise (averred in the complaint to be in the contract) that plaintiff should execute and deliver 'a good and sufficient conveyance' was the same as a promise that he should convey the title."
>
> *Burwell v. Jackson, supra.*

Quoting from the syllabus:

> "A covenant, therefore, by the vendors, that they would execute to the purchaser on a certain day '*a good and sufficient deed of conveyance*' of a certain lot of land, was held to bind the vendors to *convey a good title* to the purchaser."

In two early California cases a contrary rule was laid down:

> *Brown v. Covillaud*, 6 Cal. 566;
>
> *Green v. Covillaud*, 10 Cal. 322.

These cases are, of course, overruled by the later decisions above referred to.

Haynes v. White, supra;

Gates v. McLean, supra.

So also, the rule has been adopted after careful judicial consideration in New York.

Penfield v. Clark, 62 Barb. 584, at p. 590.

"It has been held, in a few cases, that when the vendor covenanted to convey by a good and sufficient deed, or a good warranty deed of conveyance, his covenant was satisfied by a deed good and sufficient in form, notwithstanding the title may have been incumbered, or otherwise defective. *(Gazley v. Price,* 16 John. 267; *Parker v. Parmele,* 20 id. 130; *Fuller v. Hubbard,* 6 Cowen 13). These cases are substantially overruled in the following cases: *Clute v. Robison,* (2 John. 594); *Judson v. Wass,* (11 id. 525); *Van Epps v. Schenectady,* (12 id. 436); *Fletcher v. Button,* (6 Barb. 646); S. C. (4 N. Y. 396); *Carpenter v. Bailey,* (17 Wend. 244); *Pomeroy v. Drury,* (14 Barb. 418); *Atkins v. Bahrett,* (19 id. 639); *Everson v. Kirtland,* (4 Paige 628); *Traver v. Halsted,* (23 Wend. 66); *Burwell v. Jackson* (9 N. Y. 535)."

The following comment upon the state of the law as to such a covenant appears in

39 Cyc., 1449:

"In a few cases it has been held that an agreement to convey by a 'good and sufficient deed' refers only to the form of the conveyance and merely binds the vendor to make a conveyance sufficient to pass his title, whatever that may be; and so it has been held in some cases of an agreement to execute a 'good and sufficient warranty deed', or a 'special warranty deed'. These decis-

ions, however, are contrary to the weight of authority, and in some jurisdictions they have been expressly or impliedly overruled."

In a note to

Porter v. Noyes, 11 Am. Dec. at p. 34,

it is said:

"Owing to certain anomalous decisions, made at an early period in New York and Massachusetts, which have been occasionally recognized as authoritative, there is some conflict in the American cases upon the point as to whether a contract to make a 'good and sufficient deed', or a 'good warranty deed', or a deed with covenants of a particular character, may, or may not, be satisfied by a deed which is good in point of form although the grantor has in fact no title, or only a defective title."

* * * * * *

"The undoubted weight of authority, however, is against the doctrine laid down in the New York and Massachusetts decisions above mentioned. Indeed, the New York cases have been practically if not expressly overruled, and are not now regarded as authoritative upon this point in that state."

* * * * * *

"It is conceived that the general rule may be more accurately stated to be, in accordance with the doctrine of *Burwell v. Jackson,* 9 N. Y. 535, that whatever may be the form of words used in an executory contract for the sale of land, the vendor must make a good title, unless it distinctly appears, either from the contract, or from the attendant circumstances, that such was not the intention of the parties. The cases in which the contract may be satisfied by a deed formally complying with its terms, although the vendor may have only a defective title, or no title at all, are to be regarded as exceptional, and like all other exceptions, should be clearly made out in order to remove them from the operation of the rule.

> "The obligation of the vendor to convey a good title, in order to fulfill his contract, unless he has taken care to restrict his liability, rests not only on the doctrine of implied warranty of title, as decided in *Burwell v. Jackson,* 9 N. Y. 535, and *Lounsberry v. Locamber,* 25 N. J. Eq. 554, but also upon the general principle that the promises and engagements contained in a contract are to be construed most strongly against the party making them. It certainly ought to be a very clear case which would permit a party who has contracted to sell land, to perform his contract by giving the purchaser a deed which conveys nothing but a lawsuit. This is to put the shadow for the substance. Of course, a man may bargain for a doubtful title, but he ought not to be held to have done so except upon the most satisfactory evidence that such was his intention, for that is a species of traffic which the law has never favored. It is repugnant to sound legal principles and policy to require a party to accept a deed whose only value consists in a right of action on its already broken covenants, unless it is certain that that is what he meant to buy."

We have gone into a thorough discussion of this rule because it is apparent that under what is now the settled rule of construction of a covenant "to give a good and sufficient deed", the contract here involved calls for a good title. Independently of all other considerations, therefore, it is submitted that the presence of this covenant in the contract answers defendants' contention that Beaudry was only required to give a quitclaim deed—and answers it in the negative.

But there are in the contract other provisions which compel the same conclusion.

(b) *The recital as to Beaudry "being the sole owner" of the claims shows that a good title was being bargained for.*

In the contract, and in the very sentence wherein Beaudry grants the option, Beaudry is described as

"being the sole owner and in possession of"

the mining claims (tr. fol. 66).

The effect of such a recital, taken in connection with the covenant to "make a good and sufficient conveyance" has been construed by the Supreme Court of Wisconsin in

Taft v. Kessel, 16 Wis. 291, at p. 294:

"We think the contract obviously required the plaintiff to give the defendant a good title, except that the covenant against encumbrances was to be limited to those 'made or suffered by, through or under' the vendor. *It expressly recited that the plaintiff was the 'owner',* and had agreed to convey to the defendant 'by a good and sufficient deed', etc. This shows clearly that the parties did not contemplate a mere quitclaim, but were bargaining for the conveyance of a complete title, except as modified by the limitation of the covenant against encumbrances, to those made or suffered by or under the grantor."

(c) *The covenant to execute a deed "free and clear of all encumbrances" bound Beaudry to convey a marketable title.*

In

Gervaise v. Brookins, 156 Cal. 103,

the Supreme Court of California said:

"The contract states that Book 'agrees to sell' to the vendees, 'all his right, title and interest

in' the lots, and that, upon payment of the full price, he will 'execute a deed of grant, bargain and sale of said lots (describing them) free and clear of all encumbrances'. The effect of these provisions is that Book was bound to convey to the vendees, upon payment, a good title in fee to the lots.''

See also

Porter v. Noyes, 2 Me. 22; 11 Am. Dec. 30;

Cogan v. Cook, 22 Minn. 137;

Van Kevren v. Siedler, 73 N. J. Eq. 239; 66 Atl. 920.

(4) THERE IS NOTHING TO INDICATE THAT THE CONTRACT CALLED MERELY FOR BEAUDRY'S INTEREST IN THE CLAIMS.

It has been shown that the general rule of construction of contracts for the sale of realty is that the vendor is required to convey a good title, and that where merely a quitclaim is desired, the language of the contract must clearly express that intention. The contract involved in this case is devoid of any express declaration of such intention. We respectfully submit that it is devoid of any feature that could stamp it as an agreement for a quitclaim deed.

(a) *The language of the contract not that of a contract for a quitclaim.*

The normal language of a contract calling for a quitclaim is that the vendor will convey ''his right, title

and interest''. There is no such expression in the present contract. Beaudry did not covenant to convey his interest in the claims, but that ''being the sole owner and in possession of the claims'' he would ''make a good and sufficient deed of them free and clear of all incumbrances''.

Again his obligation under the contract is spoken of as his ''obligation to convey the claims''—not his obligation to convey his *right, title or interest in the claims.*

(b) *The circumstances surrounding the sale do not suggest that a contract for a quitclaim of Beaudry's interest was intended.*

By the terms of the contract complainant and its predecessors undertook to pay a quarter of a million dollars for the claims. They further undertook to spend large sums of money in permanent improvements upon the claims. Upon the face of the bill it appears that these claims were not producing; that they required development work of an expensive character. In seven years the gross return did not exceed $35,000, and the cost of operation to complainant exceeded that sum. The outlay of so large an amount of money upon a non-producing property would in itself render it unlikely that complainant or its predecessors acted in the belief that they were buying less than a full and complete title to the claims. Their profit was to come, if at all, from the continued ownership and development of the claims—not from a transitory or uncertain possession.

(c) *The fact that when litigation arose as to the title to the claims complainant agreed to bear the expense of it, does not indicate that Beaudry was not bound to convey a good title.*

During the life of the contract, complainant obtained from Beaudry an extension of time to meet some of the payments. As a part of the consideration for the extension complainant agreed to assume the expenses in connection with the contests instituted by the United States Government to cancel certain of the claims (see the argument of December 11, 1909, annexed as Exhibit "E" to the claim, tr. fol. 82).

The original contract was entered into in July, 1906. The contests instituted by the Government were unheard of until August, 1908. The supplemental agreement referred to was made in December, 1911. None of its provisions, therefore, can be said to reflect the intention of the parties in entering into the contract. It is clear that the only effect of the agreement was to apportion certain items of expense that came up during the life of the contract,—items arising years after the contractual relations of the parties had been definitely settled.

If the original contract, as it existed down to December 11, 1911, had been susceptible to the construction that Beaudry was not required to give more than a quitclaim of his interest, there would have been no need for these provisions in the contract of December 11, 1911.

The burden of paying the expenses in that event would have rested on complainant without it.

It is apparent that in return for the extensions granted by Beaudry, complainant assumed a new obligation—it agreed to pay certain expenses which otherwise Beaudry would have been compelled to pay *owing to his obligation under the original contract to give a good title.*

It is not the law that a vendee waives the benefit of the vendor's covenant for title by agreeing to pay the expenses of litigation necessary to cure a defect. Nor can it be said that such action on his part is evidence that he expected less than a good title from his vendor.

If a contract for the sale of realty requires the vendor to furnish a valid title, the vendor must bear the expense of adverse litigation.

> *Patreski v. Minzgohr,* 108 N. W. 77 (Mich. 1906).
>
> "While a vendee under a contract of sale in possession of land is a trustee for his vendor, and cannot acquire for his own benefit a title hostile to his vendor, he is entitled in equity to reimbursement for reasonable advances expended in fortifying the vendor's title."

The fact, therefore, that Beaudry exacted a covenant that complainant should pay the expenses of the litigation over the claims in return for an extension of the time for certain payments, is evidence *that under the original contract as it then stood, Beaudry himself was bound to meet the expenses.*

This could not have been true if the contract called simply for a quitclaim of Beaudry's rights in the claims. It follows, therefore, that the contract required

the conveyance of title,—not alone of Beaudry's interest, but a good title.

(5) MINING CLAIMS ARE REAL PROPERTY. THE SAME RULES GOVERN THE CONSTRUCTION OF A CONTRACT FOR THE SALE OF MINING CLAIMS AS FOR THE SALE OF ANY OTHER SPECIES OF REAL PROPERTY.

In holding that the contract of July 21, 1906, called only for a quitclaim deed of Beaudry's title to the mining claims, the learned district judge said:

> ''The property is nowhere described as real estate. It is described, as I have said, as certain mining property, and giving a specific designation of the particular claims and how they are held'' (tr. fol. 101).

The contract provided that Fred Beaudry,

> ''being the sole owner and in possession of certain gravel mines, together with the timber, the improvements thereon, etc. * * *; including *those certain mining claims* and properties known as (then follow the names of the various claims with a statement after the name of each claim as to whether it had or had not been patented, and, as to the Greenhorn group of claims, a statement that receiver's certificates had been issued), does hereby grant to the said party of the second part an option to purchase the above described mines and *mining claims,* lands and properties, * * *'' (The italics are ours.)

From the fact that the properties are referred to in the contract as mining claims, it follows, as a matter of law, that they were treated in the contract as real property. A mining claim is universally recognized as real property.

In

Merritt v. Judd, 14 Cal. 59,

at page 64, Mr. Justice Baldwin, speaking for the Supreme Court of California, said:

> "From an early period of our State jurisprudence, we have regarded these claims to public mineral lands, as titles. They are so practically. It is very evident that the government will not change its policy in respect to them—that they will not be sold, nor the present tenure altered. Our courts have given them the recognition of legal estates of freehold, and so, to all practical purposes—if we except some doctrine of abandonment, not, perhaps, applicable to such estates—unquestionably they are, and we think it would not be in harmony with this general judicial system to deny to them the incidents of freehold estates in respect to this matter."

In that case the holding was that mining claims were to be treated as real property for the purpose of applying the rule of fixtures.

It has also been held that mining claims are real property within the meaning of Section 1091 of the Civil Code of California providing that real estate can be transferred only by an instrument in writing.

Melton v. Lambard, 51 Cal. 258;

Garthe v. Hart, 73 Cal. 541;

Moore v. Hamerstag, 109 Cal. 122.

A mining claim has been held to be subject to sale under execution.

McKeon v. Bisbee, 9 Cal. 137.

Mining claims are lienable as real property under the Mechanics' Lien Statute of California.

Berentz v. Belmont Oil Mining Co., 148 Cal. 577.

We submit, therefore, that because the contract of July 21, 1906, named the claims and referred to them as mining claims, that contract must be construed in accordance with the rules applicable to any contract for the sale of real property. Under the principles heretofore considered, it is clear that the contract so construed called for a valid title to the mining claims.

(6) THE LANGUAGE USED IN THE CONTRACT DESCRIPTIVE OF THE MINING CLAIMS NEGATIVES THE IDEA THAT MERE PROSPECTS WERE IN THE MINDS OF THE PARTIES.

The contract recites that Beaudry was the owner of "certain gravel mines, together with the improvements, timber, etc., thereon, including those certain *mining claims* and properties" known under the names given in the contract. It then provides that Beaudry grants to the party of the second part an option to purchase "the above described mines *and mining claims,* lands and properties".

Thus the properties are first referred to as mines and are then said to include certain "mining claims".

If the intention of the parties had been simply to deal with mining prospects represented by a bare possession on the part of Beaudry, it is inconceivable that what Beaudry sold should have been described as including "mines *and mining claims*". It is evident that

they used the term "mining claims" as contradistinguished from the physical properties themselves.

The term *mining claims* was obviously intended to cover something in addition to what had already been covered by the term *mines*.

Not only is it apparent from the language of the contract that the parties did not intend to buy and sell a mere possession or mere mining prospects, but it is equally apparent what they did intend to buy and sell. *That was the government title to the claims.* After each one of the twenty-one claims which are specifically named in the contract appears a designation showing to what extent the government title had been obtained. After certain of the claims appears the word "patented"; after certain other of the claims appears the word "unpatented"; and after the claims included in the so-called Greenhorn group appears the phrase "receiver's receipt".

Had the parties intended to deal with mining prospects represented merely by Beaudry's possession, the recitals as to whether the claims were patented or unpatented, or confirmed by receiver's receipts, would have been unnecessary and immaterial. These descriptive adjectives appended after the names of the respective claims show that the parties intended by the use of the term *mining claims* in the contract to refer to claims based upon proceedings in accordance with the United States Statutes, and not to mere mining prospects based upon bare possession.

The mere fact that Beaudry did not agree as to all the claims that he would give a patent is not indicative

that he did not agree to give at least an inchoate title to the claims. Title to mining claims vests before patent has issued.

Bash v. Cascade Mining Co., 69 Pac. 402 (Wash. 1902).

"Where the vendor of a mining claim, who has entered, has paid for the claim, and obtained a certificate of purchase from the government, tenders a deed in pursuance of his contract of sale, the vendee cannot refuse the deed, and rescind the contract, merely because the vendor has not received his patent for the claim."

Benson Mining & Smelting Co. v. Alta Mining & Smelting Co., 145 U. S. 428; 36 L. ed. 762.

"There is no conflict in the rulings of this court upon the question. With one voice they affirm that, when the right to a patent exists, the full equitable title has passed to the purchaser, with all the benefits, immunities, and burdens of ownership, and that no third party can acquire from the government interests as against him."

Carroll v. Safford, 3 How. 441; 11 L. ed. 671.

"Lands which have been sold by the United States can in no sense be called the property of the United States. They are no more the property of the United States than lands patented. So far as the rights of the purchaser are considered they are protected under the patent-certificate as fully as under the patent."

It is submitted that when Beaudry agreed to sell claims designated as "patented", the use of the word "patented" amounted to a covenant upon the part of Beaudry that he would convey a valid title, fortified by a United States Government patent to such claims;

that as to the claims which were described as "unpatented", he covenanted to convey a valid title fortified by a valid mining location, as to which patent had not yet issued; that as to the claims designated as "receiver's receipts" he covenanted to convey a valid title acquired from the United States Government by a valid mining location, and further fortified by a valid receiver's receipt, although patent had not issued.

A very similar contract was involved in the case of

La Grange Inv. Co. v. Shaw, 72 Pac. 795 (Ore. 1903).

In that case the plaintiff had agreed to sell the defendant certain "mining claims". In the contract the names of the respective claims were given, and the contract further contained recitals as to when the claims had been located. There was no covenant by the plaintiff to convey patented claims. It developed that, as to certain of the claims, the plaintiff did not have valid locations. It was held by the Supreme Court of Oregon, speaking through Judge Wolverton, that this contract called for a title to mining claims as distinguished from mere prospects. The fact that the claims were mentioned as having been located was noticed as being a representation that the claims were more than mere prospects—that they were validly-located claims. The holding of the court is thus stated in the syllabus:

> "A contract by which plaintiff agrees to deed defendant certain mining claims, naming them, and stating where they were located, is a representation that they are mining claims, and not mere prospects."

Speaking for the court, Judge Wolverton said:

"A person may sell a mining prospect, and deed it, if he so desires, by quitclaim or otherwise, and it would constitute a sufficient consideration for the payment of money, even if it proved worthless, if he sold as a prospect. But in the case at bar the plaintiff contracted for the sale and conveyance of quartz and placer mining claims, coupled, as defendant alleges, with representations that they were such, when in truth and in fact none such existed to plaintiff's knowledge; and the issue is on the fraudulent representations as to the mining claims. The attempt, so far as the pleadings show, was not to sell a prospect, *but certain mining claims, represented to be such.* Such was the theory adopted by the trial court, and we think is the proper one to be maintained under the issues.

Instruction No. 3 is but a sequence of the second, and unexceptionable.

By the fourth the jury were told that: 'By the terms of the contract set out in the complaint the plaintiff sold to the defendant certain mining claims, and the contract itself is a representation made by the plaintiff to the defendant that the mining claims mentioned in the contract were mining claims as stated therein.' It is argued that no such a result could follow. Why not? The contract recites that 'in consideration', etc., 'the said party of the first part (plaintiff) has caused to be executed to the said second party (defendant) a mining deed for an undivided one-half interest in and to the following mining claims, to wit: The Humpback quartz claim, which was located on Sep. 14, 1899', etc., the 'Charley Boy quartz', the 'Kansas Girl quartz claim', and so on, throughout the whole list, including 'Miney Yon placer claim' and 'Dandy Joe placer claim', stating when and where and how located, together with recording of notice, etc. These statements, whether in a contract or not, it seems to us, operate as representations concern-

> ing such claims, to be considered with all the other representations that plaintiff may have made to defendant relative thereto."

That the parties were contracting for a government title as opposed to mere possession without a right to possession is shown by the use of the term *mining claims* in addition to the word mines, and because the agreement itself specified the steps already taken toward the acquisition of the government's title.

It is submitted that the learned district judge erred in holding that the contract of July 21, 1906, was for a quitclaim deed. That it called for a valid title to the claims we believe has been demonstrated, because:

(1) The contract contained covenants uniformly held to require valid title and not a quitclaim;

(2) The contract has none of the characteristics of a contract for a quitclaim deed;

(3) Mining claims are real property and contracts for the sale of mining claims are therefore to be construed by the same rules which govern the conduct of contracts for the sale of other kinds of real property;

(4) It is evident that the parties to the contract in using the term "mining claims" referred to claims located in accordance with the United States Statutes, and agreed to buy and sell claims fortified by valid locations, as distinguished from mere prospects dependent upon bare possession. This is so, first, because the phrase "mining claims" is used in the contract in

addition to the term "mines"; and secondly, because it is modified by terms relating to the various stages which Beaudry's application for patents to the claims had reached.

II.

Complainant was not Guilty of Laches in Rescinding.

There were two sets of contests instituted by the United States which culminated in the failure of Beaudry's title to seven out of the twenty-one claims—nine hundred out of the three thousand acres—which defendant was bound to convey.

(a) *The Long Gulch claim (120 acres) and The Mule Creek Ridge claim (160 acres).*

July 21, 1906—Beaudry's application for patent pending.

Aug. 13, 1908—United States filed contest to Mule Creek Ridge application.

Sept. 10, 1908—United States filed contest to Long Gulch application.

May 25, 1910—Adverse decision by Register and Receiver of Land Office at Redding, California.

Apr. 7, 1911—Adverse decision by General Land Office at Washington.

May 23, 1911—Adverse decision by Department of Interior on appeal from order of General Land Office.

Sept. 13, 1912—Defendant's Petition for rehearing denied by Department of Interior and entries finally held for cancellation.

Oct. 1, 1912—Complainant first learned of denial of petition for rehearing.

(b) *The Greenhorn Claims* (*5 claims, 620 acres*).

July 21, 1906—Beaudry's application for patent pending.

Oct. 8, 1908—United States files contest to application.

Dec. 14, 1909—Hearing upon contest in Land Office at Redding halted; Register certifies question as to right of Beaudry to withdraw application without prejudice to right to renew same to General Land Office.

Mar. 9, 1912—General Land Office denies to Beaudry right to withdraw application and orders hearing in Land Office at Redding to proceed.

Dec. 31, 1912—Appeal by defendant to Department of Interior from above order of General Land Office still pending undetermined.

In answering the contention that complainant has been guilty of laches, we are confronted with two questions:

When did the right to rescind first arise?

What delay occurred thereafter and was it inexcusable?

(1) COMPLAINANT COULD NOT HAVE RESCINDED BEFORE OCTOBER 1, 1912.

(a) *The Pendency of the Contests Prior to October 1, 1912, did not give a Right of Rescission.*

The entire course of the litigation over the claims is set forth in exact detail in the amended bill. (Par. VIII of the amended bill, tr. fols. 12-28.)

It is alleged that the contests were instituted in the fall of 1908. But the mere pendency of the contests gave complainant no right to rescind. This is particularly true when the vendee continues through a long period to perform its part of the contract, relying upon repeated assurances by its vendor that the pending litigation is futile or unmeritorious. The amended bill alleges in this regard,

> "that at all of the times prior to the denial of said petition for rehearing by the Department of the Interior, this complainant was assured by said Beaudry, and after the death of said Beaudry by the said Angele Beaudry, as his executrix, that grounds existed for the reversal of the action of the Commissioner of the United States Land Office holding said Fred Beaudry's entry to said Long Gulch placer claim for cancellation, and that a patent to said mining claim would eventually issue to said Beaudry or to his executrix" (tr. fol. 16);

that such representations were made for the purpose of inducing complainant to continue making payments under the contract and that they were so acted upon by complainant (tr. fol. 17); also that similar representations were made as to the other claims (tr. fol. 27).

Wilcox v. Lattin, 93 Cal. 588.

In this case the claim was made that a vendee had lost his right to rescind by delaying after the institution of litigation hostile to his vendor's title. We quote from the opinion of Judge Harrison at p. 594:

> "The objection that this right of rescission was waived by the plaintiffs by their delay in asserting it cannot be maintained. They were at liberty to consider that the title of the defendant was as he had represented it, until it was determined otherwise by the court. The mere assertion of an adverse claim by a stranger would not justify them in pronouncing the title bad, and thereupon rescinding their agreement. Even after the action had been brought upon the adverse claim, the defendant assured them that there was nothing in the claim, and that it would be soon disposed of by the judgment, and requested them not to make any further sales until he could ascertain what could be done; and after the judgment he made the same representations, and gave them to understand that he would appeal therefrom, and upon such appeal establish his title. The judgment was entered on the 7th of June, 1888, and on the 12th of September thereafter they gave the notice of rescission. We think that, under the circumstances shown, they used reasonable diligence in exercising their right of rescission."

The precise point is dealt with in the case of

Nealon v. Henry, 131 Mass. 153.

It was there held that:

> "When a defect in title depends upon a question of fact, and litigation with reference thereto is assumed by the vendor, the vendee is entitled to await the outcome of such litigation before exercising his right to rescind for such defect."

See also footnote to

30 L. R. A., New Series, p. 876.

(b) *It was only when the title to the claims became "incurably defective by any ordinary method of business negotiation" that complainant's right to rescind arose.*

Under California law a vendee cannot rescind upon the ground that his vendor is without title prior to the time when the vendor has agreed to convey.

Backman v. Park, 157 Cal. 607.

"It is the settled rule in this state that the vendor need not have at least an inchoate title at the time of the contract; but that one may sell land to which he has no title, and the contract will be valid and enforceable if at the time of performance by him he is able to furnish a good title."

Joyce v. Shafer, 97 Cal. 335;

Shively v. Semi-Tropic Land & Water Co., 99 Cal. 259;

Garberino v. Roberts, 109 Cal. 126;

Latimer v. Capay Valley Land Company, 137 Cal. 286;

Hanson v. Fox, 155 Cal. 106.

The single exception to this rule is stated as follows in

Prentice v. Erskine, 164 Cal. 446.

"A vendor under an executory contract for the sale of land, the title to which at the time of the execution of the contract was incurably defective by any ordinary method of business negotiation, * * * is himself in default under the contract, and such default entitles the vendee to rescind the contract at any time, even though the time for

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final payment of the purchase price has not arrived, and to recover the part payments made under the contract.''

(c) *Title to the Long Gulch and Mule Creek Ridge claims became incurably defective for the first time on September 13, 1912, and complainant first knew of it October 1, 1912.*

Under the authorities cited above, complainant would have obtained no right to rescind had defendant's title to the claims *merely failed.* Had complainant discovered on October 1, 1912, that Beaudry had never owned any of the twenty-one claims, or, having once owned them, had conveyed them, it could not have rescinded upon that ground. The final payment was due January 1, 1913, and that was the day fixed by the contract for the conveyance of title. Neither Beaudry nor defendant were obliged to own or acquire title prior to that date.

On October 1, 1912, however, it became certain not only that defendant did not have title to the Long Gulch and Mule Creek Ridge claims, but *that she could not possibly obtain it by January 1, 1913,—that her title was ''incurably defective by any ordinary method of business negotiation''.* The claims were finally adjudicated to be non-mineral and they lay within the boundaries of a National Forest Reserve. The Government, therefore, would never patent them—title could never be bought nor acquired. If any further steps might have been taken to obtain the title, defendant did not take them, and it is certain that on December 31, 1912, when complainant rescinded, defendant could not have

put through a new application nor could she have done anything else that could have enabled her to convey a good title on January 1, 1913.

(d) *Complainant's right to rescind was perfect on October 1, 1912, by reason of the failure of title to the Long Gulch and Mule Creek claims. An additional right of rescission arose thereafter when, on December 31, 1912, it became apparent that "by no ordinary method of business negotiation" could defendant give a good title to the Greenhorn claims on January 1, 1913.*

It is true that the mere pendency of litigation hostile to a vendor's title prior to a date when the vendor is called upon to convey, will not give the vendee the right to rescind. Consequently the mere pendency of the contests as to the Long Gulch and Mule Creek Ridge claims did not afford complainant a right of rescission. Such right did not arise until the final adverse decision of the litigation.

When, however, the mere pendency of undetermined litigation at a time immediately before the time when title is to be conveyed by the vendor, creates a situation where the vendor cannot possibly cure the defect in his title within the time limited in the contract of sale, the pendency of such litigation, will, itself, give a right of rescission. Such a situation as this is instanced by the failure of title to the Greenhorn claims on December 31, 1912. Whenever, and however, a vendor's title is in such a condition that it cannot be cured prior to the

date on which a conveyance is to be made "by any ordinary method of business negotiation", his vendee may rescind.

Complainant's right to rescind became complete on October 1, 1912, by the failure of defendant's title to the Mule Creek and Long Gulch claims. When the Department of the Interior denied the petition for the rehearing it instantly became conclusively established that "by no ordinary method of business negotiation" could defendant give such a title to those claims on January 1, 1913.

It is true that there was no final decision of the Greenhorn contests prior to January 1, 1913. It is perfectly clear, however, that on December 31, 1912, the day upon which complainant offered to rescind, defendant's title as to the Greenhorn claims had failed so that it was "incurably defective by any ordinary method of business negotiation".

Even had the Department of the Interior reversed the decision of the General Land Office on that date, defendant's title could not possibly have been cured by January 1, 1913. The order appealed from was merely an interlocutory order—not a final order as in the case of the other contests. The only result of a reversal would have been to have allowed defendant to withdraw her pending application for patents. It would have left her with nothing to convey to plaintiff on January 1, 1913, but an asserted interest in the claims,—an interest which had been unable to withstand an attack by the Government and which, therefore, would be unmerchantable.

Complainant's first right to rescind arose October 1, 1912. Upon principles which are too well recognized to be seriously questioned, complainant would have been denied relief by a court of equity had it attempted to rescind prior to that date.

(2) THE DELAY OF THREE MONTHS IN RESCINDING WAS EXCUSABLE AND DID NOT CONSTITUTE LACHES.

(a) *The time itself was short.*

Complainant's right to rescind accrued on October 1, 1912. Complainant offered to rescind on December 31, 1912.

The contract had been in existence for almost seven years when complainant's right to rescind arose. Complainant had paid $200,000 upon the price of the claims as against $50,000 which remained unpaid, and had in addition expended $100,000 more in expenses of operation, permanent improvement, etc. (tr. fol. 20).

In view of these facts alone, it is submitted that the holding of the learned district judge, that complainant was barred by *laches* by a delay of three months, was unjustified.

In

Marston v. Simpson, 54 Cal. 189,

the plaintiff sought to rescind a contract for the sale of mining stock. It was held that a delay of *six months* after discovery of the fraud did not constitute laches.

In

Quarg v. Scher, 136 Cal. 406,

plaintiff sought to rescind an agreement for the sale

of real estate upon the ground that a tract represented to contain forty acres in fact contained only twenty-three and one-half acres. The discrepancy was disclosed to the plaintiff by a survey *eight* months prior to his offer to rescind. It was held that plaintiff was not barred by laches, the court saying:

> "It appears from the evidence that defendant had strictly complied with his contract in the matter of payments of yearly installments and interest up to the time of the discovery of a deficiency in the acreage; and that his subsequent offers of rescission and tender of payment and demand for deed were made within eight months after the survey was made, and about the time or within a very few days after the first unpaid installment of principal and interest fell due. We think on the facts hereinabove presented there is no laches shown on the part of defendant of which the plaintiffs can be heard to complain, even if the question of laches were properly presented."

Defendant's chief reliance in the court below was placed upon

Cross v. Mayo, 46 Cal. Dec. 173.

In that case the plaintiff sued to enforce a contract for the sale of land. The defendant attempted to rescind the contract two months after the commencement of the action, and a year after he had become fully advised of all the facts upon which his attempted rescission was based. There was nothing to explain the long delay and the defendant was held to be barred by laches. The facts are very remote from those alleged in the amended bill.

(b) *Facts are pleaded which explain and excuse the slight delay.*

The special reasons for complainant's delay of three months are pleaded in the amended bill.

These reasons were:

(a) That complainant had "paid in excess of $300,000 upon the contract" (tr. fols. 20, 21).

(b) That between October 1, 1912, and December 31, 1912, "complainant endeavored in every way by negotiations with said defendant, Angele Beaudry, and otherwise, to discover some means of enabling said Angele Beaudry, as such executrix, to complete her title" (tr. fol. 21) and "offered to extend the time when said executrix should be called upon under said contract to convey said claims to complainant in order that said defendant, Angele Beaudry, executrix as aforesaid, might in the meantime take such action as would enable her to fulfil the terms of said contract" (tr. fols. 21, 22).

(c) That all of complainant's officers resided in Minneapolis; that complainant was obliged to send, and did send, one of its officers from Minneapolis to California "to ascertain whether any reasonable means existed of overcoming the defects in the title and for the purpose of negotiating with Angele Beaudry as above indicated" (tr. fols. 22, 23).

It is submitted that if excuses are necessary to explain complainant's delay of three months in rescinding, they are found in the foregoing facts recited in the amended

bill. The purpose of the rule of *laches* is not to prescribe precipitate haste as a rule of conduct for those desiring the equitable remedy of rescission. In the language of Sec. 1691 of the *Civil Code of California,* all that is required is the exercise of reasonable diligence. As is pointed out in *Quarg v. Scher, supra,* a party who has faithfully performed his part of a contract of sale and has heavily involved himself therein has a right to at least a moderate period for reflection before embarking in a course so fraught with dangers as rescission. And it is in rare cases that a complainant will be held barred by *laches* when his delay does not appear to have misled or injured the defendant in any manner whatsoever.

Complainant's conduct is shown to have been fair and diligent and free from any consequences injurious to defendant. We confidently submit that there is no precedent or reason for holding a delay of three months to constitute *laches* under the circumstances disclosed in the amended bill.

It is submitted that appellant cannot be charged with laches:

First, because appellant was not in a legal position to rescind earlier than October 1, 1912;

Second, because the short delay between October 1, 1912, and December 31, 1912, is excused by the facts pleaded in the amended bill.

III.

Minor Objections Raised by Defendant to the Amended Bill.

In addition to the two main points which we have discussed, the motion to dismiss included a few minor objections. These grounds were not seriously advanced by defendant in the court below, nor were they noticed by the learned district judge in granting the motion. We therefore shall treat of them here very briefly.

(1) IT DOES NOT APPEAR THAT COMPLAINANT DESPOILED THE CLAIMS.

Counsel made it a ground of the motion to dismiss that, while complainant was in possession of the claims, large quantities of gold were taken therefrom.

This point is made in the face of express allegations in the amended bill.

The actual facts of the matter are set forth as follows in the amended bill:

> "that complainant and its predecessors in interest have further expended in the care and management of said properties, and in the operation of said mining claims, while in possession of said properties, and prior to the 1st day of December, 1911, further large sums which at all times have been and are largely in excess of any and all receipts from said operation.
>
> That the gross receipts from the operation of said properties during the entire time when complainant and its predecessors in interest were in possession thereof, as aforesaid, did not exceed the sum of $35,000.00; that complainant did not pros-

> pect or mine upon or operate in any manner said properties after the 13th day of September, 1912, nor was any gold or anything else of value taken from said properties by complainant subsequent to said 13th day of September, 1912'' (tr. fols. 11, 12).

It thus appears that no appreciable quantity of gold was taken from the claims during the entire period of complainant's possession and further that the claims were not worked by complainant at all after its right to rescind the contract accrued on October 1, 1912.

(2) THE FACTS RESPECTING THE FAILURE OF TITLE ARE PLEADED IN THE AMENDED BILL.

Defendant's motion also attacked the amended bill upon the ground that it complains of the failure to give a ''valid'' title. It is claimed that in this regard the amended bill rests upon a mere conclusion of law as to what constitutes a valid title.

This objection is palpably without merit. Every detail of the proceedings leading up to the cancellation of Beaudry's claims is set forth in paragraph 8 of the amended bill.

(3) ANGELE BEAUDRY IS A PROPER, IF NOT A NECESSARY, PARTY-DEFENDANT TO THE AMENDED BILL.

Angele Beaudry is sued in her individual capacity as well as executrix of the last will and testament of Frederic Beaudry. The claim is made that she is improperly joined as a party-defendant in her individual capacity.

It is alleged in the amended bill that besides being the executrix of Beaudry's will, she is also the sole legatee and devisee to all of his property. This being so, Angele Beaudry is at least a proper party-defendant to the amended bill.

(4) THERE IS NO MATERIAL VARIANCE BETWEEN THE ALLEGATIONS OF THE CLAIM AND THE AMENDED BILL.

In the court below the suggestion was made by counsel that the amended bill shows a variance from the allegations of the claim upon which it is based, in that the amended bill pleads facts showing complainant's right of rescission to have arisen not earlier than October 1, 1912, whereas the claim averred that the right to rescind arose "subsequent to the 1st day of March, 1912".

It is apparent that the former of these allegations is entirely consistent with the latter.

However, the difference in no event would amount to a material variance and it is only a material variance which can afford the basis over an objection of such a character. So long as the claim is based upon the same cause of action as the amended bill, there can exist no variance which in the eyes of the law will be deemed material. *Thompson v. Orena,* 134 Cal. 26; *Etchas v. Orena,* 127 Cal. 588; *Enscoe v. Fletcher,* 1 Cal. App. 659.

Summary.

I. **THE CONTRACT CALLED FOR A VALID TITLE TO THE MINING CLAIMS, NOT A MERE QUITCLAIM OF BEAUDRY'S INTEREST. IT DID NOT CALL FOR PATENTS, BUT IT DID CALL FOR VALIDLY LOCATED MINING CLAIMS, AS DISTINGUISHED FROM MERE PROSPECTS.**

(1) *The burden of showing the contract to be a contract for a quitclaim deed only rests upon defendant.*

(2) *The contract contains covenants and language uniformly held to distinguish a contract for good title from one for a quitclaim deed:*

(a) the covenant "to give a good and sufficient deed" is always held to call for a good title;

(b) the recital as to Beaudry "being the sole owner of the claims" shows that good title and not a quitclaim was being bargained for;

(c) the covenant to convey "free and clear of all incumbrances" shows that the contract was for a good title and not a quitclaim.

(3) *There is no express language in the contract, nor any feature of it, which indicates that it was an agreement for a quitclaim.*

(a) The expression common to most contracts for quitclaims, i. e.—that the vendor will convey "his right, title and interest" is not used in the contract.

(b) The amount of money to be paid, coupled with the fact that the claims were non-productive, militates strongly against the reasonableness of the claim that complainant was bargaining for a quitclaim.

(c) The fact that in December, 1911, defendant exacted from complainant an agreement to pay the expenses of the contests indicates that under the agreement Beaudry was bound to pay them owing to his obligation to give a good title.

(4) *Mining claims are real property. The same rules govern the construction of a contract for the sale of mining claims as for the sale of any other species of real property.*

(5) *The language used in the contract descriptive of the mining claims negatives the idea that mere prospects were in the minds of the parties.*

II. COMPLAINANT WAS NOT GUILTY OF LACHES IN RESCINDING.

(1) *Complainant could not have rescinded before October 1, 1912, because:*

(a) The mere pendency of litigation adverse to the vendor's title does not enable a vendee to rescind;

(b) Under California law a vendor is not required to have title prior to the date when he is required to convey and it is only when his

title becomes "incurably defective by any ordinary methods of business negotiation" that his vendee is thereby enabled to rescind;

(c) The title to the Long Gulch and Mule Creek Ridge claims became "incurably defective by any ordinary methods of business negotiation" when the Department of the Interior denied the petition for rehearing on September 13, 1912, and complainant first learned of this on October 1, 1912.

(d) The title to the Greenhorn claims became "incurably defective by an ordinary method of business negotiation" even later than October 1, 1912—in fact upon the very date of complainant's offer to rescind, December 31, 1912.

(2) *The delay from October 1, 1912, to December 31, 1912, did not constitute laches, because:*

(a) the time itself (three months) was short in view of the extent to which the contract had been executed and the size of the transaction;

(b) the short delay is excused by the facts pleaded in the amended bill.

III. THE MINOR OBJECTIONS TO THE AMENDED BILL ARE WITHOUT MERIT.

(1) Complainant did not despoil the claims.

(2) The facts showing the failure of title upon which complainant's right to rescind depends are pleaded in the amended bill.

(3) Angele Beaudry, individually, is a proper, if not necessary, party defendant.

(4) There is no material variance between the claim and the amended bill.

It is respectfully submitted that the District Court erred in granting the defendants' motion to dismiss the amended bill, and that the judgment should be reversed.

Dated, San Francisco,
November 5, 1914.

Respectfully submitted,
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